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No. 512

In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF GORDON A. STOUFFER, DECEASED, MARK A. LOOFBOURROW, EXECUTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. LEE RANKIN,
Solicitor General.
ABBOTT M. SELLERS,
Acting Assistant Attorney General,
I. HENRY KUTZ,
SHARON L. KING,
Attorneys,
Department of Justice, Washington 25, D.C.

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No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF GORDON A. STOUFFER, DECEASED, MARK A. LOOFBOURROW, EXECUTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit in this case (Nos. 13,945 and 13,946 below), but only in the event that the Court grants the writ in the companion case of *Homer H. and Ina Mae Marsman* v. *Commissioner*, No. 366.[1]

OPINIONS BELOW

The opinion of the Tax Court (R. 98a–108a)[2] is reported at 30 T.C. 1244. The opinion of the Court

[1] The Government is contemporaneously filing a memorandum in response to the petition in No. 366.

[2] "R." refers to the appendix to the brief of the Commissioner in the Court of Appeals. "App." refers to the appendix to this petition.

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of Appeals (App., *infra*, pp. 7–21) is reported at 279 F. 2d 27.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1960. (App., *infra*, p. 21.) By order of Mr. Justice Stewart, dated August 22, 1960, the time for filing a petition for certiorari was extended to October 28, 1960. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the decedent, Gordon A. Stouffer, realized taxable gain when he surrendered property rights of appreciated value (a stock option) in return for the release, by his estranged wife, of her rights to support and to share in his property at his death.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.
>
> (a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.
>
> (b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(26 U.S.C. 1952 ed., Sec. 111.)

STATEMENT

At the time of their remarriage in 1937, Gordon Stouffer transferred to Ina Mae Marshman 2,000 shares of class B stock in the Stouffer Corporation. This stock had an adjusted basis in his hands of $5 a share and had a market value, at that time, of $40,000. Contemporaneously with the transfer, Ina Mae gave Gordon an option to purchase the stock for $40,000 at any time prior to January 1, 1967. (App., *infra,* pp. 8–9.)

In 1950, Ina Mae and Gordon again experienced marital difficulties and each retained counsel in anticipation of Ina Mae's suit for divorce. On May 10, 1951, Ina Mae and Gordon executed an agreement negotiated by their respective counsel, the purpose of which was to settle and adjust the property rights of the parties. (App., *infra,* p. 9.) The agreement provided, among other things, that (App., *infra,* p. 9):

> 4. Gordon agrees that, upon the entry of such decree of divorce, any interest which he, or any other person, might, but for this agreement, have in any shares of stock of The Stouffer Corporation now registered in the name of Ina Mae shall forthwith terminate, and Ina Mae shall continue to own, hold and vote such stock free of any claim by Gordon or anyone claiming by, through, or under him.

On May 11, 1951, Ina Mae filed a petition for absolute divorce in the Court of Common Pleas of Cuyahoga County, and on June 27, 1951, the court entered

a decree of divorce. The decree incorporated the May 10 agreement reached by the parties. The fair market value of the stock at the time of the divorce was $400,000. (App., *infra*, p. 3.) [3]

The Commissioner determined a deficiency in the income tax of Gordon on the ground that he realized taxable gain in the amount of $359,999 (the value of the option agreement, $360,000, less the $1 consideration recited therein) upon the surrender of the valuable option in return for the surrender by Ina Mae of her rights to support and maintenance and to share in Gordon's property at his death. The Tax Court sustained the Commissioner's determination, three judges dissenting.[4]

The cases were taken to the Court of Appeals and there consolidated. The Court of Appeals reversed the Tax Court's holding that Gordon had realized taxable gain (No. 13,946). On this basis, the Court of Appeals indicated (No. 13,944) that Ina Mae's basis in the stock would not include the amount of $359,999 and that she would consequently be obligated to pay additional capital-gains taxes in connection with her subsequent sales of Stouffer stock. The Court of Appeals ordered the cases remanded to the

[3] Between 1937 and 1957, there had been capital reorganizations in the Stouffer Corporation, and the original 2,000 shares had been converted to 20,000 shares of $2.50 par value common stock.

[4] The Tax Court disagreed, however, with the Government's contention (subsequently raised in the Commissioner's cross-appeal to the Court of Appeals) that the gain was short-term rather than long-term.

Tax Court for further proceedings consistent with its opinion.[5]

Homer H. and Ina Mae Marshman have filed a petition in this Court (No. 366) for review of the Court of Appeals' decision in No. 13,944.

REASONS FOR GRANTING THE WRIT

The Government's views as to the merits and the importance of the decision below are set forth in the memorandum which is concurrently being filed in response to the petition in No. 366. The instant petition is being filed for protective purposes.

As is evident, the case involving the decedent husband (Gordon) and the case involving the former wife (Ina Mae) are reciprocally related. If Gordon had a taxable gain (the holding of the Tax Court), Ina Mae's basis in the stock was, *pro tanto*, increased. If Gordon did not have a taxable gain (the holding of the Court of Appeals), Ina Mae's basis was substantially lessened and her tax liabilities, upon subsequent sale of Stouffer stock, materially increased. As already observed, the tax liabilities of both were litigated below and the former wife has now petitioned for a writ of certiorari. If the petition in No. 366 should be granted and the former wife should ultimately prevail, it will be established, by the same token, that

[5] The Court of Appeals, having concluded that Gordon had no taxable gain, had no occasion to reach the question raised by the Commissioner in No. 13,945, *i.e.*, whether Gordon's gain should be treated as a long-term or a short-term gain. In the event that this Court should grant the instant petition and should thereafter hold that Gordon realized a taxable gain, the question whether that gain was long-term or short-term would remain open on remand to the Court of Appeals.

the Government properly asserted a deficiency against Gordon. Other considerations apart, therefore, protection of the revenue requires that the Government file this petition.

CONCLUSION

If this Court concludes that it should grant the petition in No. 366, it should also grant the petition in the instant case which is integrally related.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
ABBOTT M. SELLERS,
Acting Assistant Attorney General.
I. HENRY KUTZ,
SHARON L. KING,
Attorneys.

OCTOBER 1960.

APPENDIX

United States Court of Appeals for the Sixth Circuit

No. 13,944

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HOMER H. AND INA MAE MARSHMAN, RESPONDENTS

No. 13,945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF GORDON A. STOUFFER, DECEASED,

MARK A. LOOFBOURROW, EXECUTOR, RESPONDENT

No. 13,946

ESTATE OF GORDON A. STOUFFER, DECEASED,

MARK A. LOOFBOURROW, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

Decided May 31, 1960

Before: MILLER, WEICK and O'SULLIVAN,* Circuit Judges.

MILLER, Circuit Judge. This litigation involves the respective tax liabilities of Gordon A. Stouffer and his

* On the day of the oral argument of the cases in this Court, Judge O'Sullivan was a District Judge sitting by designation. He was sworn in as Circuit Judge on April 4, 1960.

divorced wife Ina Mae Marshman arising out of the divorce and the property settlement therein, which was granted to the wife on June 27, 1951. Ina Mae Stouffer thereafter married Homer H. Marshman. The cases were tried on a single record in the Tax Court and the three reviews of the two decisions of the Tax Court has been consolidated on this appeal.

Gordon A. Stouffer, hereinafter called Gordon, and Ina Mae Stouffer, hereinafter called Ina Mae, were married on February 22, 1930. This marriage was dissolved by an absolute divorce decree on May 24, 1934. Thereafter, Gordon asked Ina Mae to remarry him, which Ina Mae agreed to do provided Gordon would provide her with some financial security. On March 6, 1937, as part of this reconciliation, Gordon transferred to Ina Mae 2,000 shares of the Class B stock of The Stouffer Corporation, of which he was Vice-President and General Manager, which had an adjusted basis in his hands of $5.00 per share and which were then of the fair market value of $20.00 per share, or an aggregate value of $40,000.00. As part of the transaction Ina Mae executed to Gordon the following option:

> "In Consideration of One Dollar ($1.00), receipt of which is hereby acknowledged, I hereby give and grant to Gordon A. Stouffer the right and option to purchase from me at any time prior to the first day of January, 1967, two thousand (2000) shares of the Class B Common Stock of The Stouffer Corporation at Twenty Dollars ($20.00) per share, payable in cash. Should any stock dividends be paid on said stock the price herein stipulated shall include such stock dividends. All cash dividends shall belong to the undersigned unless and until said option shall have been exercised."

Ina Mae also agreed to execute an irrevocable proxy in favor of Gordon to vote the stock. The next

day, March 7, 1937, Gordon and Ina Mae were remarried.

During the years after 1937 and up until 1951 the Stouffer Company engaged in several transactions amounting to capital reorganizations involving stock dividends, stock splits and changes in description and denomination of exchanged stock. In these transactions the 2,000 Class B shares in the name of Ina Mae in 1937 became 20,000 shares of $2.50 par value common stock which Ina Mae held in 1951.

Thereafter, Gordon and Ina Mae again experienced marital difficulties and each retained counsel in anticipation of Ina Mae's instituting suit for divorce. During the latter part of 1950 and early part of 1951 counsel for Gordon and counsel for Ina Mae entered into negotiations for an agreement to be submitted to the court for approval in the event of such a divorce, which agreement was executed by the parties on May 10, 1951. On May 11, 1951, Ina Mae filed petition for absolute divorce in Court of Common Pleas of Cuyahoga County, Ohio, and on June 27, 1951, the said court entered a decree of divorce. The decree incorporated the agreement of May 10, 1951. Gordon died June 6, 1956.

The following paragraph of the May 10, 1951, agreement gives rise to the issues involved in this litigation:

> "4. Gordon agrees that, upon the entry of such decree of divorce, any interest which he, or any other person, might, but for this agreement, have in any shares of stock of The Stouffer Corporation now registered in the name of Ina Mae, shall forthwith terminate, and Ina Mae shall continue to own, hold and vote such stock free of any claim by Gordon or anyone claiming by, through, or under him."

The fair market value of the 20,000 shares of the $2.50 par value common stock in the Stouffer Company held by Ina Mae on June 27, 1951, was $20.00 a share.

With respect to the income tax of Gordon for the year 1951, the Commissioner determined a deficiency in the amount of $90,077.75 on the ground that Gordon realized a taxable gain in the amount of $359,999.00 upon the surrender of the option in the divorce settlement and decree. This was based upon the ground that Gordon's option to repurchase for $40,000.00 the 20,000 shares of stock held by Ina Mae, which had a fair market value of $400,000.00, was worth the difference between those two amounts, namely, $360,000.00, less the consideration of $1.00 which Gordon paid at the time the option was executed. The deficiency was based upon the treatment of such taxable gain as a long-term capital gain. Later, however, the Commissioner took the position that the $359,999.00 gain constituted a gain attributable to the failure to exercise an option to buy property which, under Section 117(g)(2) of the Internal Revenue Code of 1939 constituted a short-term capital gain rather than a long-term capital gain. Treating the gain as a short-term capital gain, the Commissioner asserted an additional deficiency of $233,418.48.

The Tax Court sustained the Commissioner's ruling that Gordon realized taxable gain in the amount of $359,999.00, but held that this gain was a long-term capital gain and not, as contended by the Commissioner, a short-term capital gain. The Tax Court accordingly held that there was a deficiency in Gordon's income tax for the taxable year 1951 in the amount of $90,020.75, rather than in the larger amount. In appeal No. 13,945 the Commissioner

seeks a review of the refusal of the Tax Court to sustain the additional deficiency of $233,418.48 which would result from a treatment of the gain as a short-term capital gain. In appeal No. 13,946 Gordon's estate seeks a review of the Tax Court's decision determining the deficiency in the amount of $90,020.75 or in any amount.

Appeal No. 13,944 involves the income tax liability of Ina Mae for the years 1952 and 1953 based upon the following additional facts. In 1952 Ina Mae sold 100 shares of the Stouffer stock, which was part of the 20,000 shares referred to above. In 1953 she sold 4,750 shares of this stock. The issue in this phase of the litigation is the correct basis of this stock in the hands of Ina Mae for the purpose of determining gain by her upon these sales. Based upon the Tax Court's ruling in the case of Gordon's estate that Gordon had realized a taxable gain of $359,999.00 in surrendering the option, Ina Mae's basis in the 20,000 shares includes the amount of $359,999.00. The deficiencies held by the Tax Court to exist in Ina Mae's tax for the years 1952 and 1953 were based upon this ruling. The Commissioner takes the position that the decision of the Tax Court on this phase of the case is correct but, realizing that should this Court decide against the government on the taxpayer's appeal in appeal No. 13,946, then Ina Mae's basis in the stock sold by her would in such event be accordingly decreased and the deficiencies would be larger. Accordingly, in order to protect the revenue in the event of a reversal in appeal No. 13,946, being the review sought by Stouffer's estate, the Commissioner has sought a review on this phase of the case by appeal No. 13,944.

The following sections of the Internal Revenue Code of 1939 are applicable. Section 22(a) provides

that gross income includes gains, profits, and income from sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property. Section 22(f) provides, "In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in Section 111." Section 111(a) provides, "The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in Section 113(b) for determining gain, * * *." Section 111(b) provides, "The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received."

The exact question presented has not heretofore been considered by this Court. A closely analogous question has had the consideration of the Board of Tax Appeals and the Courts of Appeals for the Second and Third Circuits.

In *L. W. Mesta*, 42 B.T.A. 933, the taxpayer, while a divorce action by his wife was pending against him, entered into a written agreement with his wife providing for a property settlement. Pursuant to the terms of the agreement the taxpayer transferred to his wife certain securities having a value in excess of their cost to him and she surrendered all of her rights to support and maintenance and to share in his property at his death. The Board held that the rights received by the taxpayer under the agreement had no fair market value, and the taxpayer realized no taxable income as a result of the transaction. The Board pointed out that since the taxpayer received no money in exchange for the securities, the taxable gain under Section 111, Internal Revenue Code, resulting from the transaction

would depend upon "the fair market value of the property (other than money) received"; that the measure of the value of the wife's right to maintenance and support was dependent upon so many uncertain factors that neither the taxpayer nor a revenue officer, even if equipped with all the aid which the actuarial art can apply, could do more than guess at it, *Humes* v. *United States*, 276 U.S. 487; and that the impossibility of evaluating the rights received by the husband constituted an insurmountable obstacle to the application of Section 22 in conjunction with Section 111 of the Internal Revenue Code. The Board also construed the transaction as basicly merely a property settlement between a man and his estranged wife—in other words, a division of property. It said "To hold that a man has realized taxable income by giving up a substantial portion of his property seems to us unreasonable and not justified either under general law or under the revenue act."

On review by the Third Circuit this ruling was reversed by a three to two vote. *Commissioner* v. *Mesta*, 123 F. (2) 986, C.A. 3rd, cert. denied, 316 U.S. 695, rehearing denied, 317 U.S. 704. The majority opinion, relying mainly upon *Helvering* v. *Horst*, 311 U.S. 112, held that Mesta received an economic gain even though he may not have received payment in money or property from Mrs. Mesta; that the disposition of the securities was the taxable event which converted unrealized economic gain into realized economic gain; and that Congress intended a measurement of values under such circumstances, notwithstanding difficulties in determining those values. The Court recognized the difficulty and at the same time attempted to solve it by stating, "We think that we may make the practical assumption that a man who

spends money or gives property of a fixed value for an unliquidated claim is getting his money's worth." The value of what the taxpayer received was accordingly held to be the same as the increased value of the securities which he transferred to his wife. The Court also stated, without discussion thereof, that the transaction could not be treated as a division of property. The two dissenting members of the Court concurred in the reasons given by the Board in reaching its decision.

In the meantime, while the review of the *Mesta* case was pending in Court of Appeals, the Board of Tax Appeals decided the case of *Walter S. Halliwell,* 44 B.T.A. 740. This involved the same question, except that the agreement entered into between the parties was approved by the divorce decree which ordered the husband to make the transfers agreed to. The Board considered this difference an immaterial one and approved and followed the Board's prior ruling in *L. W. Mesta,* supra, 42 B.T.A. 933.

On review by the Court of Appeals for the Second Circuit the decision in the *Halliwell* case was reversed in a per curiam opinion which cited and approved the ruling in *Commissioner* v. *Mesta,* supra, 123 F. (2) 986, C.A. 3rd, and held that the factual difference pointed out above was a distinction without substance. *Commissioner* v. *Halliwell,* 131 F. (2) 642, C.A. 2nd.

The Tax Court in the present case followed the rulings of the Courts of Appeals in the *Mesta* and *Halliwell* cases. Three judges dissented for the reasons given by the Board of Tax Appeals in its opinion in *L. W. Mesta,* supra, 42 B.T.A. 933.

For the purposes of our discussion we will consider appeal No. 13,946 in which Gordon's estate, hereinafter referred to as the taxpayer, seeks a review of the deficiency assessment of $90,020.75. The

taxpayer contends that the issue involved is an open one in this circuit and that the ruling of the Court of Appeals, by a closely divided court, in the *Mesta* case is not a sound one and should not be followed, and that in any event it is not applicable to the different factual situation existing in this case. We are of the opinion that these contentions have merit.

We agree with the reasoning of the Board of Tax Appeals in its opinion in the *Mesta* case that the wife's rights to maintenance and support and to share in the husband's estate in the event of his death are dependent upon so many uncertain factors and are of such a nature as to make it impossible to ascribe to it a "fair market value" as required by the statute. A review of these factors is given by the Board in 42 B.T.A. at p. 940, to which reference is made. We do not think that this problem is correctly solved by giving to those rights the value of the property which is given in exchange. Section 111(b) requires that the capital gain be measured by "the fair market value of the property * * * *received*" (Emphasis added) by the taxpayer, not by the fair market value of the property *transferred* by the taxpayer in exchange for the property received. To say that the fair market value of the property received is the same as the fair market value of the property given up not only ignores realities, but is the use of a formula which is radically different from the well established and well recognized formula approved by the courts for determining fair market value. Under long established rulings fair market value is the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell. *Fitts' Estate* v. *Commissioner*, 237 F. (2) 729, 731, C.A. 8th; *In re Williams Estate*, 256 F. (2) 217, 218, C.A. 9th. A single transaction between a husband and wife made under

the emotion, tension and practical necessities involved in a divorce proceeding does not comply with this rule. *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402–407; *Heiner* v. *Crosby*, 24 F (2) 191, 193, C.A. 3rd; *Champlin* v. *Commissioner*, 71 F. (2) 23, 29, C.A. 10th. See: *Sharp* v. *United States*, 191 U.S. 341, 348.

The evidence shows that because of the inclusion in the proposed settlement of some "emotional items", it looked at one time as though the negotiations were going to blow up and that there were occasions when the negotiations appeared about to break down. Under such conditions, values are lost sight of, concessions are made, one does not expect or insist upon getting his money's worth for what he gives up. Unfortunately, it is often the case that what a husband transfers to his wife in a so-called property settlement in a pending divorce action is not given merely in exchange for a release of alimony and dower rights, but also includes, without being so labeled, such additional amount as the husband may be willing to pay in order to have the marriage status terminated. A property settlement in a divorce proceeding is usually influenced and often dictated by numerous intangible, personal and practical considerations which play no part in a transaction between a willing seller and a willing buyer in the open market. The value of what is given up is no criterion of the fair market value of the "property" received.

Recognizing the well settled rule governing the determination of fair market value and the existence of such intangible factors in a property settlement reached by the parties in a pending or contemplated action for absolute divorce, we are not able to agree with the final ruling in the *Mesta* case that the fair market value of the release by a wife of her alimony

and dower rights against her husband and his estate is properly determined by ascertaining and giving to it the fair market value of the property which she receives from her husband. *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, supra, 338 U.S. 396, 402–407.

It is no answer to say that the economic gain realized under the ruling in *Helvering* v. *Horst*, supra, 311 U.S. 112, will escape taxation unless so evaluated. Nor do we consider it a correct answer to say that Congress intended a measurement of values notwithstanding difficulties in determining those values. *Helvering* v. *Horst* dealt with the *realization* of economic gain, not the *valuation* of such gain. The valuation and taxation of that gain under Section 111(b) was not involved. What Congress intended in the present case is shown by Section 111(b). By reason of the specific provisions of that section there is no *taxable* gain unless the amount of such economic gain is measured in a certain way. Congress did not intend or authorize that the measurement of taxable gain be made in any other way than that based on the fair market value of the property *received*. That requirement has not been complied with. If it has no fair market value, or if such fair market value has not been shown, it may be economic gain but it is not taxable gain by reason of the express provisions of Section 111(b). *Champlin* v. *Commissioner*, supra, 71 F. (2) 23, 30, C.A. 10th.

In the present case the situation is further complicated by the question of the validity of the option. The evidence is uncontradicted that Ina Mae's attorney took the position that since the 2,000 shares of B stock no longer existed and the option covered stock dividends but not splits, it was only good at its best for 2,000 shares of the new stock for $40 000.00, that Gordon's attorneys devoted approxi-

mately sixty-three hours in a study of the problem without arriving at a conclusion, and that there were reasonable grounds for a bona fide dispute. Ina Mae's attorney testified that Gordon's attorney contended that the option was enforceable against the 20,000 shares and that the witness took the position that it was not enforceable. Both the attorney for Gordon and the attorney for Ina Mae testified that Ina Mae's attorney stated that a lawsuit would result if an attempt was made by Gordon to exercise the option for 20,000 shares. Gordon's attorney testified that Ina Mae stated to him when advised that an attempt would be made to exercise the option, "Well, you'll have to sue me to get it."; that Ina Mae's attorney stated, "Well, I don't care. I just don't care whether the option is any good or not. As far as I am concerned, I am going to get this stock for Ina Mae and I am going to get all of it."; that as far as he could recall, there never was any further discussion about the legality of the option from that day on; that at one time he had proposed to release 17,000 shares on behalf of Gordon and keep 3,000 shares; that he later had a tentative agreement with Ina Mae's attorney to release 18,000 shares and keep 2,000 shares; and that finally when they had worked out all the other things in the agreement he gave up on that and agreed to Ina Mae keeping all of the 20,000 shares. Ina Mae's attorney testified that it was apparent to him that this was a settlement of marital affairs, that ultimately it was going to be a division of property, and that it didn't seem to make a great deal of difference in which basket some of the assets were to be, so while it was discussed, it was never pursued to any great length; that there were occasions when the negotiations appeared about to break down; and in that event the matter of the validity of the option would certainly have been one

of the questions at issue. It will be noticed that the property settlement agreement provides that any interest which Gordon "might" have in any shares of stock registered in the name of Ina Mae "shall forthwith terminate."

In view of this evidence we do not accept the Tax Court's finding that the great weight of the evidence established that there was no dispute between the parties about the validity of the option covering 20,000 shares in 1951, that it was admitted that Gordon was asserting that it covered the 20,000 shares, and the weight of the evidence was that Ina Mae agreed that it covered the 20,000 shares.

The Tax Court considered it unnecessary to pass on the validity of the option and did not do so, with which view we concur. The question involved is not whether at some time after the settlement agreement was entered into the option is held to be valid or invalid, but rather that at the time the settlement agreement was entered into there was a bona fide, unresolved dispute between the parties about its validity. It is common knowledge that such a dispute, similar to a cloud on title, has a material adverse effect upon the fair market value of any property being transferred. *Champlin* v. *Commissioner,* supra, 71 F. (2) 23, 30, C.A. 10th. With a bona fide dispute existing between the parties with respect to the validity of the option, with the reasonable possibility that it might be declared invalid, we are of the opinion that it can not be held in the absence of any supporting evidence that the value of the option was nevertheless the same as it would be if no question existed about its validity.

Even if we accept the ruling of the *Mesta* case that the fair market value of the release is the same as the fair market value of the option, it is impossible to tell from the evidence in this case what the

fair market value of the option was. If the Commissioner's valuation of the option at its full face value of $359,999.00 is incorrect, it necessarily follows that the assessment was invalid and must be set aside. *Helvering* v. *Taylor*, 293 U.S. 507; *Durkee v. Commissioner*, 162 F. (2) 184, 187, C.A. 6th.

We agree with the view taken by the Board of Tax Appeals in the *Mesta* case, concurred in by the dissenting judges on the review of the Board's ruling in the Court of Appeals, and also approved by the three dissenting judges of the Tax Court in this case that the impossibility of evaluating "the fair market value of the property (other than money) received" by the husband from the wife in the property settlement entered into between them, constitutes an insurmountable obstacle to the application of Section 22(f) in conjunction with Section 111(a) and (b). Accordingly, we are of the opinion that the Commissioner's determination that Gordon Stouffer realized a tax gain in carrying out the divorce settlement was incorrect and the deficiency must be set aside.

This ruling in case No. 13,946 also controls the rulings to be made in appeals No. 13,944 and No. 13,945.

In the case involving the deficiency assessment against Estate of Gordon A. Stouffer, deceased, out of which arose appeals Nos. 13,945 and 13,946, the decision of the Tax Court is reversed and the case remanded to the Tax Court with instructions to enter judgment for said Estate and set aside the deficiency assessment in toto.

In the case involving the deficiency assessment against Homer H. and Ina Mae Marshman, out of which arose appeal No. 13,944, the decision of the Tax Court is reversed and the case remanded to the Tax Court for reconsideration and further proceedings in

accordance with the ruling in appeals Nos. 13,945 and 13,946.

Judgment of the United States Court of Appeals for the Sixth Circuit

(Filed May 31, 1960)

On Petition to Review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby reversed and the case remanded to the Tax Court with instructions to enter judgment for said Estate and set aside the deficiency assessment in toto.

Approved for entry:

(S) SCHACKELFORD MILLER, Jr.,
United States Circuit Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1960

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 542.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs

ESTATE OF GORDON A. STOUFFER, DECEASED,
MARK A. LOOFBOURROW, EXECUTOR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JAMES C. DAVIS,
WARREN E. HACKER,
1857 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 512.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

ESTATE OF GORDON A. STOUFFER, DECEASED, MARK A. LOOFBOURROW, EXECUTOR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Though, admittedly, the decision below is of great interest to the litigant taxpayers affected, neither this case nor No. 366 warrants review by this Court. That this is true is manifest from the Petition, here, and the Memorandum filed by the Solicitor General in No. 366. The cases present no important question of Federal law, nor does it appear that their decision necessarily conflicts with the decision of any other Court of Appeals. The suggested conflict is more apparent than real.

True, the decision below produced a different tax result from a division of property between husband and wife in a divorce case than the tax result which followed from decisions in the Second and Third Circuits which also involved property settlements in connection with divorce. On careful study of the decisions involved, it appears that these differences in result arose not from a conflict between

the circuits as to applicable legal principles, but rather from different conclusions which the courts drew from the facts with which they respectively were confronted.

The claim asserted by the Petition in No. 366, that the Court below violated accepted principles of judicial review, is based upon a rule of procedure which, because of congressional amendments, the effect of which have been recognized by this Court, has not been in force for more than ten years and must, therefore, be disregarded.

Therefore, despite the importance of the cases to the litigants, they present no question with which this Court should be concerned.[1]

STATEMENT OF THE CASE.

With a single exception respondent accepts petitioner's statement, as far as it goes. It is true that, at the time of the divorce between respondent's decedent (Gordon) and his wife (Ina Mae), the stock, *allegedly* covered by the option in question, had a fair market value of $400,000.00. It is inaccurate, however, to characterize the agreement entered into by Gordon and Ina Mae as one for "the surrender of the *valuable* option in return for the surrender by Ina Mae of her rights to support and maintenance and to share in Gordon's property at his death." (Pet. p. 4.)

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[1] "* * * it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head." *Layne & Bowler Corporation v. Western Well Works, Inc., et al.*, 261 U. S. 387, 393.

The terms of the agreement did not equate the surrender of the option by Gordon to the surrender by Ina Mae of her rights to support and maintenance. Rather, the agreement was one providing generally for division of all of their property interests between them. It included "the settlement and adjustment of any and all * * * rights whatever of either of the parties in and to the property of the other." (R. 14a.) The stock allegedly subject to option had been owned by Ina Mae for many years, therefore no transfer of the stock was involved. So far as concerns the alleged option, the agreement provided simply that *if* and to the extent that the option "might" give Gordon any right in the stock, such right would terminate as a part of the over-all division of property. (R. 17a, par. 4, Ex. 12-L.)

It is also inaccurate to describe the option as "valuable." Neither the Tax Court nor the Court of Appeals considered it necessary to pass on the validity of the option and neither did so. (Pet. p. 19.) The Court of Appeals found "it is impossible to tell *from the evidence in this case* what the fair market value of the option was." (Pet. pp. 19 and 20, emphasis supplied.) That the option had any value is questionable because a bona fide dispute existed between Gordon and Ina Mae with respect to its validity, with the reasonable possibility that it might be declared wholly invalid. (Pet. p. 19.)

ARGUMENT.

The only reasons asserted in the Petition here or in that filed in No. 366 for granting the writ are, first: that the decision below is in conflict with the decision of the Third Circuit in *Mesta*[2] and that of the Second Circuit in *Halliwell*;[3] and, second, asserted by the petitioner in No. 366 but not urged by the petitioner here, that the Court of Appeals violated accepted principles of judicial review in refusing to accept findings of fact of the Tax Court which were clearly erroneous. Neither ground is tenable.

A. NO SUBTANTIAL CONFLICT EXISTS BETWEEN THE DECISION OF THE SIXTH CIRCUIT AND THE MESTA-HALLIWELL RULE.

The Commissioner and the Solicitor General, whose responsibility it is to assert the importance of any question of Federal law or procedure improperly decided below and the adverse effect, if any, of the decision upon the administration of the Internal Revenue laws, filed the Petition here only "for protective purposes." Moreover, in his Memorandum filed in No. 366, the Solicitor General makes no claim that the Court below disregarded principles of judicial review when it rejected the findings of the Tax

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[2] *Commissioner of Internal Revenue v. Mesta*, 123 F. 2d 986 (C. A. 3d), certiorari denied 316 U. S. 695.

[3] *Commissioner v. Halliwell*, 131 F. 2d 642 (C. A. 2d) certiorari denied, 319 U. S. 741, decided *per curiam*, adds nothing to *Mesta* by way of analysis or exposition of the legal principle involved. Both cases involve property settlements entered into in contemplation of divorce. In both cases the husband transferred stock which had an established market value. In addition, in *Halliwell* the value of the stock was specified in the agreement between the parties and subsequently incorporated in the divorce decree.

Court and made its own findings as to the facts established by the evidence. Rather, he is content with the mild equivocation that "We disagree with this holding * * *. Nonetheless, we recognize that this issue is one confined to the *peculiar facts* of this case." (Memorandum for the Respondent in No. 366, p. 5, emphasis supplied.)

So far as concerns the alleged conflict, the Solicitor General and the Commissioner euphemistically describe it as "muted." (Memorandum for the Respondent in No. 366, p. 5.) Of course, a conflict which does not speak is no conflict at all.

The Solicitor General correctly describes the *Mesta-Halliwell* rule as one which "rests on the practical assumption that a man who gives property of a fixed value for an unliquidated claim receives his money's worth." [1] (Memorandum for the Respondent in No. 366, p. 3. It is only the recognition of the general application of this rule in tax matters that "is of considerable administrative importance." (Memorandum for the Respondent in No. 366, p. 3.) It follows that unless the Sixth Circuit has rejected "the practical assumption" of *Mesta* and *Halliwell* as a guide to decision of tax cases, its decisions, in practical analysis, do not conflict with those of the Second and Third Circuits.

In order to understand the effect of the decision below and its significance as a precedent in the Sixth Circuit, it must be read together with that Court's later decision in *United States v. General Shoe Corporation*, 282 F. 2d 9 (Memorandum for the Respondent in No. 366, p. 3). *General Shoe* was decided on authority of *International*

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[1] *Commissioner v. Mesta*, 123 F. 2d 986, 988.

Freighting,[5] a Second Circuit decision which, in turn, rests on *Mesta* and *Halliwell*. Clearly, the Sixth Circuit has not rejected the *Mesta* and *Halliwell* decisions insofar as they pronounce principles of law.

In *General Shoe*, where the Sixth Circuit did apply the *Mesta-Halliwell* rule, the Court commented on its failure to apply the rule in its decision in this case, and said, "In no respect do we believe there exists any real conflict."[6] Why? Because, said the Court: "How different are the facts * * *."[7]

In *Mesta* and *Halliwell* the operative facts were (1) the husband gave up property of "a fixed value" and (2) the property was given up in return for an identifiable though unliquidated claim of the wife for support and maintenance. Where similar operative facts (the exchange of a fixed value property for an identified consideration were shown to exist) as in *General Shoe*, the Sixth Circuit followed *Mesta* and *Halliwell*. Here, the Sixth Circuit reached a different result from that obtaining in *Mesta* and *Halliwell* because, from the particular evidence in this case, it found the operative facts diferent from those which controlled the *Mesta* and *Halliwell* decisions.

Here, the Court found that the property given up by the taxpayer husband had no fixed value but rather that "it is impossible to tell *from the evidence in this case* what the fair market value of the option was." (Pet. App. pp.

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[5] *International Freighting Corp. v. Commissioner*, 135 F. 2d 310 (C. A. 2d).

[6] Appendix to Memorandum for the Respondent in No. 366, p. 14.

[7] *Ibid*, p. 15.

19 and 20, emphasis supplied). Further, it found that, *under the evidence in this case,* it could not be said that the property transferred was exchanged for or equated to the wife's claim for support and maintenance, segregated from other motivations and influences which were not susceptible of evaluation.[8]

The failure of the Commissioner and Solicitor General to petition for review of the decision below until after compelled so to do by the action of petitioners in No. 366, indicates their agreement that it would be improper to attempt to force decisions, involving unique facts, into inexorable judicial formulas.[9]

Since the difference in judicial result was produced by differences between the cases in their facts and not in the legal principles announced, the Petition should not be

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[8] "*The evidence shows* that because of the inclusion in the proposed settlement of some 'emotional items,' it looked at one time as though the negotiations were going to blow up and that there were occasions when the negotiations appeared about to break down. Under such conditions, values are lost sight of, concessions are made, one does not expect or insist upon getting his money's worth for what he gives up." (Pet. App. p. 16, emphasis supplied.)

As this Court has said, "Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules. * * * At times, however, peculiar circumstances may make it impossible to determine a 'market value.'" *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396 at 402.

[9] "And empiricism suggests sailing as close to the record of a particular case as possible. Only thus shall we avoid abstract pronouncements bound to distort or to be distorted by the case-by-case adjudicatory process especially appropriate in problems of this nature. Either lip-service will be paid such formulas while decisions are rooted in considerations outside them, or formulas not fitting practical circumstances will achieve impractical results." 338 U. S. 396, Mr. Justice Frankfurter, concurring, at p. 408.

granted on the grounds of conflict. *Wisconsin Electric Co. v. Dumore Co.*, 282 U. S. 813.

B. THE ALTERNATE GROUND ADEQUATELY SUPPORTS THE DECISION BELOW.

In the light of the specific language of Section 111(b),[10] the *sine qua non* of the *Mesta-Halliwell* rule is that the value of that which the wife exchanged, i.e., "the amount realized from the sale or other disposition of the property," for property given up by the husband, is to be measured by the value fixed for the husband's property. The Court below squarely held:

> "Even if we accept the ruling of the *Mesta* case that the fair market value of the release is the same as the fair market value of the option, it is impossible to tell from the evidence in this case what the fair market value of the option was." (Pet. App. pp. 19 and 20).

Although the Tax Court found that, by agreement of the parties, the option was valid and of a value equated to the value of the stock upon which petitioners in No. 366

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[10] "Internal Revenue Code of 1939:

"SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

"(26 U. S. C. 1952 ed., Sec. 111.)" (Pet. pp. 2 and 3.)

now claim it constituted a call, the Court of Appeals found to the contrary that there was "a bona file dispute existing between the parties with respect to the validity of the option, with the reasonable possibility that it might be declared invalid, * * *."[11]

The facts relied upon to support the alternate ground of decision are detailed in the opinion.[12] With respect to many of these facts, the Court said: "the evidence is uncontradicted."

The Solicitor General and the Commissioner express only a mild dissatisfaction with this holding, citing in support the testimony of Homer Marshman, a petitioner in No. 366.[13] Even this mild disagreement is further qualified by the statement that "Nonetheless, we recognize that this issue is one confined to the peculiar facts of this case," among which were the identity of the attorneys who served Ina Mae in the negotiations, their sequence of service and their personal interest or lack thereof in the results of such negotiations.[14] But whether or not the Court

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[11] Pet. App. p. 19.

[12] Pet. App. p. 19

[13] Memorandum for the Respondent in No. 366, p. 5.

[14] Ina Mae was originally represented by Thomas Herbert, presently a Judge of the Supreme Court of Ohio, and Charles Carr, who, at the time of the trial in the Tax Court, was a Judge of the Common Pleas Court of Cuyahoga County, Ohio. Although Judge Herbert and Judge Carr was associated together in Ina Mae's representation, the negotiations on her behalf were actually handled by Judge Carr. (R. 56a, 86a). Judge Carr worked on this matter from January, 1951, until some time in April, 1951. (Ex. 23, R. 30a-37a). About ten days before the agreement between Ina Mae and respondent was finally signed (R. 66a) Mr. Marshman, whom Ina Mae married later in 1951 (Stip. par. 27, R. 12a), and who is a petitioner in No. 366, first entered the negotiations on her behalf.

below was right or wrong in its determination of fact is not a question sufficient to invoke the certiorari jurisdiction of this Court.[15]

Since the decision below is adequately supported by an alternate ground, as to which no conflict or Federal question exists, a review of any alleged conflict between such decision and *Mesta* and *Halliwell* would not change the result reached by the Court below. This result must stand unless this Court should undertake a detailed examination of the evidentiary facts in order to determine whether the Court below properly performed a routine judicial responsibility. Such an administrative or managerial function falls outside the appropriate discretionary jurisdiction of this Court.[16]

C. THE COURT BELOW VIOLATED NO ACCEPTED PRINCIPLE OF JUDICIAL REVIEW.

Although the Solicitor General and the Commissioner make no claim that the Court below departed from accepted principles of judicial review and accept the fact that the decision below rests upon a valid alternate ground of decision, the petitioners in No. 366 claim that the Court of Appeals was not free to reject a clearly erroneous finding of fact on the part of the Tax Court, if the record contained any substantial evidence tending to support the Tax Court's finding. In support of this position petitioners in No. 366 cite four decisions of this Court, the last of

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[15] *Southern Power Company v. North Carolina Public Service Company, et al.*, 263 U. S. 508.

[16] *The Monrosa, et al. v. Carbon Black Export, Inc.*, 359 U. S. 180, 184.

which is *Dobson v. Commissioner*, 320 U. S. 489. (Pet. in No. 366, pp. 15, 16.) The difficulty with the position so asserted is that it no longer represents the law.[17]

Petitioners in No. 366 are plainly wrong in their assertion that the Court below "clearly exceeded its role as an appellate court * * * and has invaded the province of the Tax Court." Rather, in rejecting the finding of the Tax Court as clearly erroneous and making its own finding with respect to the existence of a bona fide dispute as to the validity of the option and the resultant impossibility of evaluating it, the Circuit Court was merely complying with the guidance and instructions of this Court.[18]

CONCLUSION.

The decision of the Court of Appeals is correct. It is not in conflict with the decision of any other court of appeals. The Court below transgressed no rule of appellate procedure, nor did it exceed its proper and appropriate jurisdiction in this respect. The apparent conflict, if any,

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[17] "'The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court * * * in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury * * *.' The last words first came into the statute through an amendment to § 1141(a) of the 1939 Code in 1948 (§ 36 of the Judicial Code Act, 62 Stat. 991). The purpose of the 1948 legislation was to remove from the law the favored position (in comparison with District Court and Court of Claims rulings in tax matters) enjoyed by the Tax Court under this Court's ruling in *Dobson v. Commissioner*, 320 U. S. 489. Cf. note 11, *supra*." *Commissioner v. Duberstein*, 363 U. S. 278, 4 L. ed. 1218, Footnote 13 at p. 291.

[18] A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U. S. 364, 395.

between the decision below and the *Mesta* and *Halliwell* cases consists only of a difference in results because of differing appraisals of facts, and not from any conflict in the existence or applications of rules of law. The Solicitor General and the Commissioner are correct in their conclusion that under the foregoing circumstances this case does not offer an "appropriate vehicle" for the determination of any question by this Court.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES C. DAVIS,
WARREN E. HACKER,
1857 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Respondent.

Of Counsel:
SQUIRE, SANDERS & DEMPSEY,
1857 Union Commerce Building,
Cleveland 14, Ohio.